

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

GERRI WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-08-034 CLS
	)	
PIZZA HUT OF KIRKWOOD	)	
HIGHWAY, INC., a Delaware	)	
corporation; PIZZA HUT OF	)	
KIRKWOOD #2, INC., a Delaware	)	
corporation, and NPC	)	
INTERNATIONAL, INC., a Kansas	)	
corporation,	)	
	)	
Defendants.	)	

Date Submitted: September 9, 2011  
Date Decided: November 1, 2011

On Defendants' Motion for Summary Judgment based upon the Statute of Repose.  
**DENIED.**

**ORDER**

Gary S. Nitsche, P.A., Weik, Nitsche & Dougherty, 1300 N. Grant Avenue, Suite 101, P.O. Box 2324, Wilmington, DE 19806  
*Attorney for Plaintiff.*

Justin P. Callaway, Esq., Paul Cottrell, Esq., One Customs House, 704 King Street, Suite 500, P.O. Box 1031, Wilmington, DE 19899.  
*Attorneys for Defendants.*

**Scott, J.**

## **Introduction**

Before the Court is Defendants' Motion for Summary Judgment pursuant to Superior Court Civil Rule 56, and Plaintiff's response in opposition. Defendants' Motion for Summary Judgment is based upon Delaware's Statute of Repose, 10 *Del. C.* § 8127. The Court has reviewed the parties' submissions. For the following reasons, the motion is hereby **DENIED**.

## **Background**

On or about June 22, 2006, Gerri Williams ("Plaintiff") was a customer at the Pizza Hut, a restaurant located at 3611 Kirkwood Highway, Wilmington, Delaware, when she allegedly fell on a sidewalk ramp on the premises. As a result of this incident, Plaintiff filed a negligence suit arising from an unsafe condition on the Defendants' premises. Plaintiff seeks damages for personal injuries, pain and suffering, past and future medical expenses, lost wages, interest, court costs, scarring and disfigurement. The Defendants involved in this litigation are Pizza Hut of Kirkwood Highway, Inc. ("Pizza Hut"), Pizza Hut of Kirkwood 2, Inc. ("Pizza Hut 2"), and NPC International, Inc. ("NPC").

Pizza Hut and Pizza Hut 2 move for summary judgment. They claim that Delaware's Statute of Repose, 10 *Del. C.* § 8127, precludes the Plaintiff's action because more than 6 years passed from the completion of the ramp. Pizza Hut argues summary judgment is appropriate because, even assuming that the ramp

was negligently constructed while Pizza Hut leased the property, more than six years passed between the construction of the ramp and Plaintiff's fall. Pizza Hut 2 argues that it is also precluded from liability because there is no evidence that Pizza Hut 2 had any interest in the property and even if it did, the interest must have occurred prior to August 1997.

Plaintiff responds to the Defendants' motion by arguing that a defense based on the Statue of Repose is unavailable because Defendants were tenants of the property. Plaintiff further submits that whoever possessed the property at the time of construction is responsible for the safe design of the ramp, obtaining permits, and having the required inspections completed.

### **Standard of Review**

Superior Court Civil Rule 56 permits a defendant to file a motion for Summary Judgment. The Court will grant summary judgment if pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there are no genuine issues of fact and that the moving party is entitled to judgment as a matter of law.<sup>1</sup> The moving party initially bears the burden of showing that there are no issues of material fact.<sup>2</sup> Once shown, the burden shifts to the nonmoving party to demonstrate that there are material issues

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<sup>1</sup> Super. Ct. Civ. R. 56.

<sup>2</sup> *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

of fact.<sup>3</sup> The Court must evaluate the facts in the light most favorable to the nonmoving party.<sup>4</sup>

### **Discussion**

Defendants' reliance on Delaware's Statute of Repose<sup>5</sup> is improper. Applying 10 *Del. C.* § 8127 to Pizza Hut and Pizza Hut 2 does not further the statute's intended policy. The statute is designed to balance the right of an injured party with the need to limit builder and architect liability.<sup>6</sup> To this effect, it protects parties who perform or furnish any construction of an improvement to real property and those causing to perform or furnish any design, plan, supervision of or observation of any construction of any improvement.<sup>7</sup> In *City of Dover*, the Supreme Court concluded that suppliers who did not perform or furnish construction were not protected by the statute.<sup>8</sup> Like the suppliers, Pizza Hut and Pizza Hut 2 did not perform or furnish construction and are thus not covered by this statute.

Furthermore, Plaintiffs are correct that, if the Defendants were tenants at the time of the injury, they are not protected under the statute. The statute itself is clear that a party may not use 10 *Del. C.* § 8127 as a defense if they are in "actual

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<sup>3</sup> *Id.* at 671.

<sup>4</sup> *Burris*, 2006 WL 2329373, at \*1.

<sup>5</sup> 10 *Del. C.* § 8127

<sup>6</sup> *Cheswold Vol. Fire Co. v. Lambertson Const. Co.*, 489 A.2d 413, 417 (Del. 1985).

<sup>7</sup> *Id.* at 415.

<sup>8</sup> *City of Dover v. Int'l. Tel. and Tel. Corp.*, 514 A.2d 1086, 1089 (Del. 1986).

possession or actual control as owner, tenant, or otherwise, of such improvement . . .  
.”<sup>9</sup> Pizza Hut was in possession or control of the property at the time of the  
accident and is precluded from claiming the Statute of Repose as a defense to this  
lawsuit.

Additionally, genuine issues of material fact remain as to whether Pizza Hut  
2 had actual possession or control of the property and summary judgment cannot  
be granted at this time.

### **Conclusion**

Based on the forgoing, Defendants’ Motion for Summary Judgment is  
**DENIED.**

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
**Judge Calvin L. Scott, Jr.**

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<sup>9</sup> 10 *Del. C.* § 8127.